JUDGE JIM ROGERS
Hearing Date: May 23, 2008, 1:30 P.M.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

LUMMI NATION, et al., Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants,	No. 06-2-40103-4 SEA DEFENDANT-INTERVENOR WASHINGTON WATER UTILITIES COUNCIL'S RESPONSE TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT
JOAN BURLINGAME, et al. Plaintiffs, v. STATE OF WASHINGTON, et al., Defendants, and WASHINGTON WATER UTILITIES COUNCIL, et al., Intervenors.	

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I. RELIEF REQUESTED AND SUMMARY OF ARGUMENTS.

In this case Joan Burlingame, et al., ("Burlingame Plaintiffs") and Lummi Nation, et al. ("Plaintiff Tribes") have raised facial constitutional challenges to various provisions of the Municipal Water Law ("MWL"). The Court should deny Burlingame Plaintiffs' Motion for Summary Judgment ("Burlingame Plaintiffs' Motion") and Plaintiff Tribes' Motion for Summary Judgment ("Plaintiff Tribe's Motion").

Plaintiffs' arguments are based on two fundamental mischaracterizations. First, Plaintiffs mischaracterize the way in which the various provisions of the MWL operate such that their challenges fail. For example, Plaintiffs claim that the challenged provisions operate retroactively, when several, including Section 5(2), codified at RCW 90.03.386(2) ("Place of Use Provision") and Sections 1(3) and 1(4) of the Municipal Water Law, codified at RCW 90.03.015(3)-(4) ("Definitions"), are prospective in operation only. Because the alleged retroactivity is crucial to Plaintiffs' challenges, the Court should reject Plaintiffs' challenges.

Similarly, Plaintiffs also mischaracterize several challenged provisions by overstating their effect. For example, Plaintiffs claim that Section 6(3), codified at RCW 90.03.330(3) ("Pumps and Pipes Provision") automatically perfects inchoate water rights. Based on its plain language, however, the Pumps and Pipes Provision is more limited in its effect. The provision states that certificates issued on the basis of system capacity are in "good standing" but does not exempt such certificates from the beneficial use requirement. Because the provisions do not have the effect Plaintiffs ascribe to it,

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Plaintiffs constitutional challenges fail.[1]

Second, Plaintiffs mischaracterize the law as it existed prior to the adoption of the MWL. Plaintiffs claim that the law prior to the adoption of the MWL was clear and that the MWL retroactively changed the law. This mischaracterization is fundamental to Plaintiffs' separation of powers theory, in which they argue the MWL contravenes case law, and their substantive due process theory, in which they argue that the MWL retroactively "expands" rights by changing the law. However, contrary to Plaintiffs' mischaracterization, the law was ambiguous and uncertain prior to the MWL and Ecology applied the law in an inconsistent manner. The MWL clarified these uncertainties, and did not replace one set of laws with a completely different set of laws, as Plaintiffs implicitly suggest.

Plaintiffs bemoan the fact that the Legislature did not embrace Plaintiffs' subjective interpretation of previously ambiguous law. Having failed to persuade the Legislature, the Plaintiffs are pursuing a remedy in court. The Plaintiffs' challenge is based on political and policy grievances, rather than western water law or constitutional principles. Rather than protecting junior water rights as a class, Plaintiffs are really trying to assert an unfounded legal right to diminish or eliminate municipal rights in favor of instream flows. The Court should reject Plaintiffs' invitation to substitute their judgment for the Legislature's in curing unclear law and exercising the State's police power.

[1] Even if the Plaintiffs' mischaracterizations of the provisions were reasonable interpretations, the Court must nevertheless reject them. Where there is a discrepancy between the Plaintiffs' and Defendants' competing interpretations of the MWL, the constitutional interpretation offered by Defendants and Intervenors prevails. *State v. Browet*, 103 Wn.2d 215, 219-220, 691 P.2d 571 (1984) ("Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality").

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II. COUNTER-STATEMENT OF FACTS.

WWUC incorporates the statement of facts included in its motion for summary judgment, dated February 1, 2008 ("WWUC Motion") at 3-16. In Plaintiffs' "statements of facts" in their motions for summary judgment, Plaintiffs primarily make legal arguments to which WWUC responds in Section V, below. Plaintiffs' statements of fact also contend that the "potential impacts" of the MWL "are enormous" and "will greatly increase withdrawals of groundwater from locations where existing rights and or stream flows will be adversely affected." Burlingame Motion at 7; Plaintiff Tribes' Motion at 14.

To support these allegations of injury, Plaintiffs offer declarations and exhibits that provide "illustrative examples" of their claims. Burlingame Motion at 15; Plaintiff Tribes' Motion at 14. Plaintiff Tribes provide the Declaration of Joel Massmann, Ph.D., P.E. ("Massmann Declaration") to support certain factual assertions regarding water rights and water balance calculations in Kitsap County. The Burlingame Plaintiffs provide the Declaration of Joan Burlingame ("Burlingame Declaration") that states that Burlingame's domestic well has experienced a "drastic decline" in water availability that she ascribes to the effects of the MWL. Burlingame Decl. at ¶¶ 6, 8. As an "example", Burlingame identifies the City of Kent's Clark Springs Water System. Burlingame Decl. at ¶ 9.

WWUC has two general responses to Plaintiffs' factual assertions. First, WWUC agrees with the State that evidence of a law's application in specific factual circumstances is inappropriate in a facial challenge. Evidence offered by the Plaintiffs for the purpose of showing that the MWL is unconstitutional in a specific set of facts should not be allowed

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by the Court. For that reason, as explained more fully in section V (B) below, WWUC has filed a motion in limine to exclude Plaintiffs' "as-applied" evidence.

Second, Plaintiffs' "as-applied" evidence is inaccurate and unreliable. WWUC offers the declarations attached hereto to counter and rebut the Plaintiffs' evidence, in the event the Court allows Plaintiffs' evidence. Joseph Becker, a professional hydrogeologist with over 20 years of experience specific to Kitsap County, finds that Dr. Massmann relies on faulty assumptions, inappropriate use of groundwater models, and flawed and inconsistent methodology. Declaration of Joseph Becker ("Becker Declaration"), Ex. A. A veteran water utility operator of P.U.D. No. 1 of Kitsap County ("KPUD") explains that Dr. Massmann's factual statements about KPUD's water rights -- assumptions on which Dr. Massmann's conclusions rest -- are incorrect. Declaration of Robert D. Hunter ("Hunter Declaration"). Even if Dr. Massmann's assertions regarding place of use and groundwater are accurate as to Kitsap County (which is doubtful, given the analytical flaws), those assertions do not apply in other regions with different conditions. Declaration of James W. Miller In Support of WWUC's Response at ¶¶ 5-7.

The City of Kent has analyzed the hydrologic relationship between Burlingame's domestic well and Kent's Clark Springs Water System and determined that Burlingame's assertions are baseless. Declaration of Bradley Lake ("Lake Declaration"), ¶¶ 5-6, Ex. A (Aspect Consulting Technical Memorandum). Burlingame's speculative charge that her water rights "have been and will be harmed by" the MWL is disproved by professional hydrogeological analysis that the Burlingame well taps a groundwater body unrelated to,

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and separated by a bedrock barrier from, Kent's Clark Springs Water System.

The Massmann and Burlingame Declarations share common characteristics: they rely on flawed assumptions and incorrect data to reach speculative conclusions.

III. STATEMENT OF ISSUES.

WWUC incorporates the statement of issues included in the States' Memoranda in Opposition to Burlingame Plaintiffs and Tribal Plaintiffs. WWUC has consolidated the two statements of issues here and included defined terms for the Court's convenience.

1. Whether Sections 1(3) and 1(4) of the Municipal Water Law, codified at RCW 90.03.015(3)-(4) ("Definitions"), which define "municipal water supplier" and municipal water supply purposes," facially violate the separation of powers doctrine.

2. Whether Section 6(3), codified at RCW 90.03.330(3) ("Pumps and Pipes Provision"), which affirms water right certificates that were issued based on system capacity, facially violates the separation of powers doctrine.

3. Whether the Definitions and Section 3, codified at RCW 90.03.560, which authorizes conformance of water rights for municipal purposes, facially violate substantive due process.

4. Whether Sections 4(4) and 4(5), codified at RCW 90.03.260(4)-(5) ("Connection and Population Provisions"), which address service connection and population numbers in approved water system plans, facially violate substantive due process.[2]

[2] Only Plaintiff Tribes have alleged that the Connection and Population Provisions violate substantive due process.

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5. Whether Section 5(2), codified at RCW 90.03.386(2) ("Place of Use Provision"), which clarifies the place of use for water rights for municipal supply purposes, facially violates substantive due process.

6. Whether the Pumps and Pipes Provision, which affirms water right certificates that were issued based on system capacity, facially violates substantive due process.

7. Whether the Place of Use Provision, which clarifies the place of use for water rights for municipal supply purposes, facially violates procedural due process.

8. Whether the Connection and Population Provisions, which address service connection and maximum population limits under approved water system plans, violate procedural due process.[3]

IV. EVIDENCE RELIED UPON.

This motion is based on the pleadings, motions and declarations filed in this matter, including the Declarations of Joseph Becker, Robert Hunter, and Bradley Lake, James W. Miller and Tadas Kisielius in support of WWUC's Response, and the documents attached thereto.

WWUC offers the declarations in support of this response to contest Plaintiff's factual allegations regarding the application of the MWL to particular settings or circumstances. As noted in WWUC's Motion in Limine and in section V(B), below, the Court should exclude Plaintiffs' factual "as applied" evidence offered in support of Plaintiffs' facial claims. However, in the event that the Court denies the motion and

[3] Only Plaintiff Tribes have alleged that the Connection and Population Provisions violate procedural due process.

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considers Plaintiffs' as-applied evidence, WWUC submits the declarations attached hereto to contest Plaintiffs' evidence.

V. AUTHORITY.

A. Standard of Review.

WWUC incorporates the State's arguments setting forth the standard of review at 6-10 of the State's Memorandum In Opposition to Burlingame Plaintiffs' Motion for Summary Judgment ("State's Response to Burlingame") and 11-15 of the State's motion for summary judgment. As noted by the State, Plaintiffs must prove beyond a reasonable doubt that there is no set of circumstances in which the challenged MWL provisions can be constitutionally applied. *See City of Redmond v. Moore,* 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Plaintiffs argue that this "no set of circumstances" test is not applicable on the basis of the Court of Appeals decision in *Robinson v. City of Seattle*, 102 Wn. App. 795, 806, 10 P.3d 452 (2000). However, as noted by the State, *Robinson* is an anomaly and stands in contrast to the weight of Washington case law on facial challenges.

Recently, the Court of Appeals reiterated that the no set of circumstances test is applicable in facial constitutional challenges. *See Galvis v. State Dept. of Transp.,* 140 Wn. App. 693, 702, 167 P.3d 584 (Div. II 2007) ("To prevail on a facial challenge, the challenging party must show that 'no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.') (citing *Redmond,* 151 Wn.2d 664).

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Moreover, Plaintiffs provide no alternative standard of review in the absence of the no set of circumstances test.[4] Based on the weight of the case law and on the arguments offered by the State, Plaintiffs are required to meet the "no set of circumstances" test to prove their facial claims.

B. The Court Should Reject Plaintiffs' Use of "As-Applied" Evidence to Prove Their Facial Challenge to the MWL.

In their motions for summary judgment, Plaintiffs acknowledge that their facial challenges should not involve disputed evidence. *See* Burlingame Plaintiffs' Motion at 15 ("This facial challenge does not involve disputed facts as to any particular application of the MWL"); Burlingame Plaintiffs' Motion at 14 ("To resolve a facial constitutional challenge, a court need consider only whether 'the language of the [statute] violates the constitution. [Courts] do not contemplate whether the [statute] would be constitutional 'as applied' to the facts of a particular case'") (citing *JJR, Inc. v. City of Seattle,* 126 Wn. 2d 1, 3-4, 891 P.2d 720 (1995)); Plaintiff Tribes' Motion at 14 ("Because this case presents a facial challenge to the MWL, it does not depend on disputed evidence"). Nevertheless, Plaintiffs offer declarations that present facts of the alleged application of the MWL to specific circumstances, including the Kitsap Peninsula, Washington State University, and the City of Kent, among others. *See, e.g.,* Plaintiff Tribes' Motion at 9-10; *id.* at 11-12;

[4] Plaintiffs' reliance on *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998), is misplaced. *See* Burlingame Plaintiffs' Motion at 14. The *Weden* court did not apply the "unduly oppressive" test as a standard of review, as Plaintiffs imply in their parenthetical. Plaintiffs confuse the standard of review with the substantive test courts apply to determine whether a prospective statute violates substantive due process. *See Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990) (question of whether an ordinance is unduly oppressive is the third prong of the test applied to alleged violation of substantive due process) (cited by *Weden*, 135 Wn.2d at 287). The "unduly" burdensome test is not an alternate standard of review.

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Massmann Declaration, Burlingame Declaration at ¶¶ 6-18 and Exhibits B-X; Cornelius Declaration at ¶¶ 5-11 and Exhibits B-K; Burlingame Plaintiffs' Motion at 7-8.

To explain this seemingly inconsistent approach, Plaintiffs characterize these "as-applied" facts as "illustrative examples." *See* Burlingame Plaintiffs' Motion at 15; Plaintiff Tribes' Motion at 14. The semantic distinction Plaintiffs draw is meaningless; Plaintiffs have inappropriately submitted alleged factual evidence of the application of the MWL to specific facts in support of their facial claims. *See City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989) ("Under [facial] analysis, the factual setting of this case is *irrelevant* . . .") (emphasis added). *See also Washington State Grange v. Washington State Republican Party, et al.*, 552 U.S. ____, ____ S.Ct. ____, 2008 WL 704368 at *5 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases) (citations omitted).[5] Accordingly, WWUC has filed a Motion in Limine Regarding Plaintiffs' Illustrative Examples requesting that the Court exclude this evidence because it is irrelevant in the context of a purely facial challenge. We will not repeat the arguments in this response.

[5] The United States Supreme Court also notes that the several reasons for exercising judicial restraint when addressing facial challenges include the point that there has been "no opportunity to implement the [challenged statute] in the context of actual disputes... or to accord the law a limiting construction to avoid constitutional questions." *Washington State Grange*, 2008 WL 704368 at *5. The Court indicates that "[e]xercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy..." *Id.* In other words, the Court should reject Plaintiffs' invitation to declare the statute unconstitutional based on what Plaintiffs admit is speculative allegations of harm. *See* Burlingame Plaintiffs' Motion at 7 (describing the "potential impacts" of the law).

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Even if the Court admits the evidence, the Court should not ascribe any weight to Plaintiffs' evidence because it is insufficient to prove Plaintiffs' claims or justify the remedy they seek. In a facial challenge, Plaintiffs seek the invalidation of the statute in all applications so as to render it utterly inoperable. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). Even if proven to be true, evidence of alleged unconstitutional application to specific fact patterns cannot show that there is no set of circumstances in which they law can be applied constitutionally. More than anything, the fact that Plaintiffs must point to alleged examples to make their case demonstrates that Plaintiffs cannot point to any part of the statute that is unconstitutional on its face.

In the event the Court admits the evidence, WWUC presents rebuttal evidence contesting Plaintiffs' characterization of the application of the law in those several factual circumstances. As noted in declarations of Joseph Becker, Robert Hunter, James W. Miller, and Bradley Lake, and as explained in further detail in the sections that follow, Plaintiffs' factual assertions of harm allegedly suffered due to the operation of the MWL are highly speculative, are not grounded in fact, and are based on false assumptions. To the extent that the Court admits Plaintiffs' evidence over WWUC's objection, WWUC's rebuttal evidence shows that the Court should not accept Plaintiffs' characterizations, assumptions and conclusions as factual verities. WWUC's rebuttal evidence shows that Plaintiffs' facts do not present evidence of unconstitutional application or otherwise prove Plaintiffs' allegations. More fundamentally, WWUC's rebuttal evidence reinforces why the Court should only consider evidence of alleged application of the law to specific facts

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in the context of an as-applied challenge, where the complicated factual patterns can be thoroughly presented. By contrast, where Plaintiffs acknowledge that there is no as-applied challenge before this Court, the Court should exclude or otherwise limit alleged evidence of the application of the law to specific fact-patterns.

C. The Plaintiffs' Arguments That the MWL Violates Separation of Powers Are Without Merit.

Plaintiffs' arguments that the Definitions and the Pumps and Pipes provisions of the MWL violate the separation of powers doctrine rest on Plaintiffs' mischaracterization of case law. Specifically, Plaintiffs assert that prior to the MWL the law was clear on issues relating to the types of entities that could claim an exemption for municipal water supply purposes and the validity of pumps and pipes certificates. *See* Burlingame Plaintiffs Motion at 5. According to Plaintiffs' characterization, the MWL "overrules" or "contradicts" these alleged legal certainties. *Id.* at 18. Plaintiffs' characterization of case law preceding the MWL is inaccurate. The case law upon which Plaintiffs rely, including *Theodoratus* and *Acquavella,* is limited and does not stand for the broad propositions asserted by Plaintiffs. Accordingly, the Court should reject Plaintiffs' separation of powers arguments.

1. The Definitions Do Not Facially Violate Separation of Powers Doctrines (Issue #1).

WWUC incorporates section V(C)(2) of the State's Response to Burlingame Plaintiffs and offers the following arguments.

The Court should reject Plaintiffs' claims that the Definitions, on their face, violate the separation of powers doctrine because: (1) the Definitions operate prospectively, even

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when applied to antecedent facts, such that the Plaintiffs' separation of powers claims must fail; and, (2) even if the Court determines that the application to antecedent facts makes the Definitions retroactive, the Definitions do not violate separation of powers because the Definitions are curative and do not contravene prior case law.

First, as noted in WWUC's Motion, the Definitions are applied *prospectively* in the relinquishment context because Ecology, courts, and the PCHB will only use them in determinations subsequent to the adoption of the MWL. *See* WWUC's Motion at 24-34. Accordingly, Plaintiffs' separation of powers claims must fail. The Definitions are retroactive even when Ecology, courts, and the PCHB in those future determinations apply the Definitions to facts that predate the adoption of the MWL. As the Supreme Court noted:

> A statute is not retroactive merely because it draws upon antecedent facts for its operation… A statute operates prospectively when the precipitating event for the application of the statute occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute

Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Assoc., 83 Wn.2d 523, 535, 520 P.2d 162 (1974) (citations omitted). When applying the Definitions to determine whether relinquishment has occurred, the precipitating event is an Ecology, court or PCHB determination. Because those entities will use the Definitions only in determinations subsequent to the adoption of the MWL, the precipitating event (the determination) occurs only after the adoption of the MWL. Therefore, the Definitions are prospective, even though a court, the PCHB or Ecology may apply the Definitions to facts

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that predate the adoption of the MWL. Because they are prospectively applied in subsequent determinations, the Definitions do not violate separation of powers and the Court should reject Plaintiffs' arguments to the contrary.

The Plaintiffs ignore the "precipitating event" analysis, even though the case law upon which they rely adopts it. Plaintiffs cite *State v. Pillatos* as a recent reiteration of the prohibition on legislation that violates separation of powers, but the court adopted the precipitating event analysis and determined that the statutory amendment in question was not retroactive and did not violate separation of powers. 159 Wn.2d 459, 471-474, 150 P.3d 1130 (2007) (citations omitted) (holding that a statutory amendment is prospective in effect even though it applies to crimes committed prior to the adoption of the statute because the precipitating event for the operation of the law is the sentencing or trial that had not yet begun).

In the alternative, if the Court concludes that the Definitions operate retroactively, the application of the Definitions to evidence that predates the adoption of the MWL does not violate separation of powers because it does not contravene case law. As noted by the State in Section V(C)(2) of the State's Response to Burlingame Plaintiffs and in WWUC's Motion at 11-13, Plaintiffs' argument to the contrary is based on a mischaracterization of the law as it existed prior to the adoption of the MWL. Prior to the adoption of the MWL, the term "municipal water supply purposes" was ambiguous and its application in any specific setting was uncertain and inconsistent. WWUC's Motion at 11-13. WWUC has presented evidence of Ecology's historic inconsistent application of the term. *Id.* The

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MWL adopted Definitions clarifying this ambiguity for the first time. The Definitions are therefore curative. *See id.* at 28-35

Plaintiffs' argument that the Definitions contravene the court's holding in *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), is without merit. WWUC agrees with the State that the statements in *Theodoratus* relied on by Plaintiffs are *dictum*. The question of which entities qualify for the exemption was expressly *not* before the court in *Theodoratus*. In its review, the Court expressly declined "to address issues concerning municipal water suppliers in the context of this case." *Id.* at 594. Thus, contrary to Plaintiffs' assertions, the Court in *Theodoratus* did not hold that private developers are not "municipal water suppliers" for purposes of determining the exemption from statutory relinquishment. The Definitions do not contravene prior case law, are curative, and therefore do not violate separation of powers.

2. The Pumps and Pipes "Good Standing" Provision Does Not Facially Violate the Separation of Powers Doctrine (Issue #2).

WWUC incorporates the State's arguments in Section V(C)(1) of the State's Response to Burlingame and offers the following additional arguments.

In addition to the mischaracterizing of *Theodoratus,* Plaintiffs also mischaracterize the Court's holding in *Dep't of Ecology v. Acquavella,* 131 Wn.2d 746, 935 P.2d 595 (1997). In *Acquavella* the Court reversed the award of a quantity of water in a general stream adjudication. *Id.* at 754-57. The water right at issue in *Acquavella* was an irrigation right held by an irrigation district. *Id.* at 751. The water right in question was not a certificate issued on the basis of the pumps and pipes policy. Nor was there any

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discussion in the case of the pumps and pipes policy or of pumps and pipes certificates.

As also noted by the State, the Pumps and Pipes Provision is a curative provision that is meant to address the cloud of uncertainty cast by the Court's holding in *Theodoratus*. While the Court's decision in *Theodoratus* did not pertain specifically to certificates issued on the basis of pumps and pipes capacity and while the Court expressly declined to address issues related to municipal water suppliers, Ecology nevertheless began extrapolating the Court's holding beyond the facts of the case. *See* Declaration of Jim Miller in Support of WWUC's Motion for Summary Judgment, ¶¶ 4, 5, Exs. A, B; Declaration of John Kirner in Support of WWUC's Motion for Summary Judgment, ¶¶ 33-34. For example, following *Theodoratus,* Ecology generated and circulated draft Policy 1250, which proposed a wide range of "curative" actions that could result in rescission or restriction of the inchoate portions of pumps and pipes certificates. Declaration of Jim Miller in Support of WWUC's Motion for Summary Judgment, ¶¶ 4, 5, Exs. A, B; Declaration of John Kirner in Support of WWUC's Motion for Summary Judgment, ¶¶ 33-34. Accordingly, though the Court's holding in *Theodoratus* did not go as far as Plaintiffs claim, the decision cast a cloud of uncertainty over those certificates. *Id.* Ecology never adopted Policy 1250, but the uncertainty of Ecology's draft policy lingered. *Id.* It was in this context of uncertainty that the MWL clarified the status of pumps and pipes certificates.

Through the MWL, the Legislature addressed that uncertainty in a manner consistent with *Theodoratus.* The MWL notes that pumps and pipes certificates are

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"rights in good standing." The choice of terms mirrors the definition of inchoate rights that the Supreme Court cited in its decision. *See Theodoratus*, 135 Wn.2d at 596 (an inchoate right is "an incomplete appropriative right *in good standing*") (quoting 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)) (emphasis added). Rather than eliminating the beneficial use requirement, as is suggested by Plaintiffs, the Pumps and Pipes Provision simply acknowledges that a water right documented by a pumps and pipes certificate under RCW 90.03.330 (3) is valid and, in some cases, may include unperfected (in whole or in part depending on the circumstances) water appropriation fully available for use by the municipal water supplier. Specifically, the provision indicates that the as-yet-unused or inchoate portion remains unperfected until actual beneficial use occurs.

Without any analysis Plaintiffs assert that this interpretation is not consistent with plain language of the statute. Burlingame Motion at 25. Plaintiffs are in error. As noted above, the legislature borrowed, almost verbatim, from the definition of inchoate rights cited in *Theodoratus.* Thus, the choice of the term "rights in good standing" reflects the inchoate nature of the rights, and does not, as Plaintiffs argue, automatically perfect those rights. Had the Washington Legislature intended to enact a pumps and pipes provision with the meaning that Plaintiffs seek to impose on RCW 90.03.330(3), it would not have had to look far for an example. Idaho law provides that a water right held by a "municipal provider" to meet reasonably anticipated future needs "shall be deemed to constitute

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beneficial use."[6] If the Washington Legislature had intended to declare all pumps and pipes certificates to be fully perfected, then it would have used express wording to that effect, like the Idaho Legislature did.[7] The Washington Legislature did not do so.

The Court should also reject Plaintiffs' argument that the State's and WWUC's interpretation of the Pumps and Pipes Provision is not consistent with legislative history. *See* Burlingame Plaintiffs' Motion at 26. The legislative history to which Plaintiffs cite in support for their interpretation of the Pumps and Pipes Provision does not indicate that the provision was intended to eliminate the beneficial use requirement or that the provision contravenes *Theodoratus*. *See* Goho Declaration, Ex. U at 1 (Final Bill Report, 2E2SHB 1338). Instead, the provision merely acknowledges that the law was designed to address the uncertainty created by the Ecology's extrapolation of the Court's decision in *Theodoratus*. *Id.* In fact, the bill report on which Plaintiffs rely acknowledges that the Court in *Theodoratus* expressly did not address issues related to municipal water suppliers, thereby acknowledging that the MWL does not contravene the decision. *Id.*

Thus, contrary to Plaintiffs' assertions, the MWL did not reverse existing legal

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[6] "A water right held by a municipal provider to meet reasonably anticipated future needs shall be deemed to constitute beneficial use, and such rights shall not be lost or forfeited for nonuse unless the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet reasonably anticipated future needs." Idaho Code § 42-223(2) (emphasis added).

[7] It is also interesting to note that Idaho defines a "municipality" to mean "a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution." Idaho Code § 42-202B(4). In contrast, the term "municipal provider" means: "(a) A municipality that provides water for municipal purposes to its residents and other users within its service area; (b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or (c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a 'public water supply' as described in section 39-103(12), Idaho Code." Idaho Code § 42-202B(5).

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principles. Instead, the Pumps and Pipes Provision is a curative provision designed to address the uncertainty that occurred in the wake of *Theodoratus* due to the efforts of some Ecology staff to extrapolate the Court's holding to the municipal setting. Because the Pumps and Pipes Provision did not contravene case law and is consistent with the Court's decision in *Theodoratus,* the provision does not violate separation of powers.

D. The Court Should Reject Plaintiffs' Claims that Provisions of the MWL On Their Face Violate Substantive Due Process.

Plaintiffs' claims that various provisions of the MWL violate substantive due process are based on their retroactive characterization of the law. Therefore, to prove their claims, Plaintiffs must show that the provisions, on their face, deprive[8] Plaintiffs of vested rights.[9] *State v. Shultz*, 138 Wn.2d 638, 646-47, 980 P.2d 1265 (1999). As is

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[8] Plaintiffs inconsistently describe the substantive test for due process. At various times, the Plaintiffs allege that the MWL: is "harming" property rights, Burlingame at 20; "diminishes" water rights, *id.*; "impairs," *id.* at 21; "injures," *id.;* or is "affecting" rights, Plaintiff Tribes Motion at 16.

[9] Plaintiffs' allegations are vague with respect to the categories of rights they claim are impaired. In their complaints, for purposes of establishing standing, they refer to federally reserved rights (which are not at issue in this lawsuit, as noted in Plaintiff Tribes' Complaint at 4 n.1), certificated rights, exempt wells, and instream flows. However, rather than refer to any of these categories of rights, Plaintiffs repeatedly refer to the alleged impairment of "junior water rights," generally. Plaintiffs' allegation of deprivation of these vague and non-specific rights underscores the jurisprudential risks associated with facial challenges, as recently described by the United States Supreme Court:

> In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases. The State has had no opportunity to implement the [challenged statute] in the context of actual disputes... or to accord the law a limiting construction to avoid constitutional questions. Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy... Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

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demonstrated in further detail, below, and in WWUC's Motion at V(C), (D), (E) and (H), the Court should reject Plaintiffs' substantive due process claims. As a preliminary matter, several of the contested provisions, including the Definitions and Place of Use Provision, are prospective only, such that Plaintiffs' claims fail.

Plaintiffs cannot show that any of the challenged provisions of the MWL, on their face, deprive Plaintiffs of vested rights. Plaintiffs allege that the provisions of the MWL violate substantive due process by "expanding" water rights to the detriment of other water rights. Plaintiffs paint the law prior to the MWL as clear and unambiguous such that any retroactive changes to the law amounted to a retroactive "expansion" of the class of rights that benefitted from the amendment.[10] However, Plaintiffs' contention that the provisions of the MWL expand water rights is based on a mischaracterization of the state of the law prior to the adoption of the MWL. The challenged provisions did not reverse the law or overrule court precedent. Instead, as shown above, the law prior to the MWL was ambiguous and inconsistently implemented, such that the changes did not "expand" any rights. The MWL clarified those longstanding ambiguities and resolved any uncertainty. In actuality, Plaintiffs assert a vested right in their expectation that the law should continue according to their subjective interpretation of previously ambiguous law.

Washington State Grange v. Washington State Republican Party, et al., 552 U.S. ____, ____ S.Ct. ____, 2008 WL 704368 (2008) (citations omitted). Plaintiffs invite this Court to ignore all of the above-articulated reasons for exercising judicial restraint in the context of facial challenges. Specifically, Plaintiffs ask the Court to speculate regarding the application of the law based only on Plaintiffs' vague allegations of deprivation of unspecified rights and Plaintiffs' "illustrative examples." The Court should reject Plaintiffs' invitation to overturn the law in this facial challenge based on vague allegations and speculation.

[10] Plaintiffs' substantive due process claims are therefore rooted in the same inquiry as their separation of powers argument. Accordingly, the Court must reject their substantive due process claims for the same reasons.

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While Plaintiffs may have wanted the ambiguities resolved by the legislature in a different manner, they do not have any vested right in the expectation that their subjective interpretation of an ambiguous law will be embraced by subsequent clarifying legislation. There is no vested right in a "mere expectation based upon an anticipated continuance of the existing law." *Washington State Farm Bureau v. Gregoire,* 162 Wash.2d 284, 305, 174 P.3d 1142 (2007) The case law upon which Plaintiffs rely does not support their position. Therefore, the challenged provisions of the MWL do not impair any of Plaintiffs' rights or deprive Plaintiffs of those rights.

1. The Definitions Do Not Facially Violate Substantive Due Process (Issue #3).

WWUC incorporates section V(D)(1) of the State's Response to Burlingame Plaintiffs, with the exception of the State's argument that the Definitions require "active compliance."[11] In addition, WWUC offers the following arguments.

The Court should reject Plaintiffs' claim that the Definitions violate substantive due process. First, as with Plaintiffs' separation of powers claims, Plaintiffs' substantive due process claims rely on the mistaken presumption that the Definitions operate retroactively simply because they may be applied to facts that predate the adoption of the

[11] As noted in WWUC's Motion at 32-34, the Court should not rely on the State's proposed "active compliance" interpretation of the Definitions. Under the State's active compliance interpretation, a water right holder must actively comply with the Definitions in order to qualify for exemption from relinquishment under the Definitions. This interpretation nullifies the exemption for municipal water supply purposes and conflicts with the entire purpose of the MWL. Moreover, as noted in WWUC's Motion at Sections H(1)-(3) and in section V(D)(1) of this Response, the Court need not consider the "active compliance" interpretation in order to find that the Definitions are constitutional. Thus, rather than adopting the State's "active compliance" interpretation, the Court should decide this issue based on the plain language of the statute and without reference to the State's "active compliance" theory.

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MWL. As indicated in section V(C)(1), above, and in WWUC's Motion at 24-28, the Definitions operate prospectively because Ecology, courts and the PCHB apply the Definitions in determinations that occur after the adoption of the MWL. Even if Ecology, courts or the PCHB may consider facts that predate the adoption of the MWL, it is the consideration of the facts and any conclusion based on those facts that is the "precipitating event" for purposes of determining whether the statute is prospective or retroactive. Thus, even though a future determination may draw on facts that predate the adoption of the MWL, the Definitions are nevertheless prospective in effect – because they are applied only in future determinations. Because the Definitions operate prospectively, not retroactively, Plaintiffs' claims that the Definitions violate substantive due process fail.[12]

Even if the Court determines that the Definitions are retroactive solely because they may draw on antecedent facts, Plaintiffs' claims that the statute violates substantive due process nevertheless fail because Plaintiffs cannot demonstrate that they have been deprived of vested rights. Any alleged deprivation is based on their mischaracterizations of the state of the law prior to the adoption of the MWL and mischaracterizations of the manner in which the Definitions operate.

Plaintiffs allegations of deprivation are based on a mischaracterization of the law prior to the adoption of the MWL. Plaintiffs contend that the Definitions effectively "expanded" the exemption for Municipal Water Supply Purposes by broadening the class

[12] As noted in WWUC's Motion at 28-34, even if the Court disregards *Aetna* and its progeny and determines that the consideration of facts that predate the adoption of the statute make the statute retroactive, the statute is nevertheless appropriately retroactive. The Definitions are curative and serve to clarify a longstanding ambiguity.

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of entities that could qualify for the definition. Plaintiffs' characterization is misguided. As noted in WWUC's Motion at 11-13, and in section V(C)(1), above, prior to the MWL, the class of entities that qualified for "municipal water supply purposes" was ambiguous. As noted by the State, the holdings in *Theodoratus* and *Georgia Manor*[13] did not resolve this ambiguity, contrary to Plaintiffs' assertions. Therefore, prior to the adoption of the MWL, the question of which entities could claim the exemption for municipal water supply purposes was ambiguous and unclear. The legislature's effort to clarify the ambiguity therefore does not constitute an "expansion" of those water rights that fall within the newly adopted definition.

Plaintiffs' allegations of deprivation are also based on a mischaracterization of the way the Definitions operate in the relinquishment context. Plaintiffs claim that the Definitions have "revived" water rights that have been relinquished. *See* Burlingame Plaintiffs' Motion at 21; Plaintiff Tribes' Motion at 17. Plaintiffs claim that this alleged revival of water rights deprives them of those amounts of water that allegedly have been relinquished by senior appropriators under the law in effect prior to the MWL. Burlingame Plaintiffs' Motion at 22; Plaintiff Tribes' Motion at 15. Plaintiffs' logic is misguided.

None of the parties to this suit take the position that the MWL could be used to go

[13] The *Georgia Manor* decision upon which Plaintiffs rely was overturned on other grounds. Second Declaration of Tadas Kisielius in Support of WWUC's Response, Exhibit A. The Superior Court reversed the PCHB's finding of relinquishment on the grounds that the non-use of Georgia Manor's well was not "voluntary." *Id.* Because the court's decision was based on other grounds, its discussion of the municipal exemption is pure *dictum*. The PCHB decision was reversed. *Georgia Manor* is not precedent.

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back and "undo" a relinquishment order entered prior to the effective date of the act.[14] There is no suggestion on the face of the MWL that the Legislature intended to revive any water that the PCHB, Ecology or a court had previously determined to have been relinquished or extinguished. Instead, the MWL operates purely prospectively, in determinations made *after* the effective date of the MWL. Therefore, contrary to plaintiffs' assertions,[15] this case does not involve "rights that had been statutorily relinquished" prior to the effective date of the MWL because a statutorily relinquished right would have been the subject of an order issued by Ecology in a particular case. Any water right that has been relinquished pursuant to such an order is unaffected by the adoption of the Definitions. The only other water rights relevant to Plaintiffs' argument are rights that fall within the scope of the new Definitions that have not previously been determined by Ecology, courts or the PCHB to have been relinquished. Plaintiffs have no vested rights in these quantities of water because they have not been relinquished.[16] Further, even if such rights were relinquished, it is speculation at best that such action would in any way benefit the Plaintiffs' water rights.

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[14] To the extent Plaintiffs are arguing that the Definitions operate in this manner, the Court should reject Plaintiffs' interpretation. Such an interpretation is not supported by the plain language of the statute or by a clear legislative statement of intent to that effect. Moreover, such an interpretation would be unconstitutional such that the Court should reject it in favor of the interpretation offered by Defendants and Intervenors. When presented with a constitutional interpretation of a statute in the face of a challenge to the statute, the constitutional interpretation prevails. *State v. Browet*, 103 Wn.2d 215, 220 691 P.2d 571 (1984) ("Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality").

[15] *See* Burlingame Plaintiffs' Motion for Summary Judgment at 22.

[16] As explained in WWUC's motion for summary judgment, statutory relinquishment in the State of Washington does not occur until *after* a final order of relinquishment is issued by the PCHB or by a superior court. *See* WWUC Motion at 23. Unless and until such an order is entered, statutory relinquishment and/or extinguishment of a water right has not taken place.

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Therefore, the Court should reject the Plaintiffs' arguments that the Definitions violate substantive due process. Contrary to Plaintiffs' claims, the question of which water rights are within the municipal water supply purposes exemption from relinquishment was ambiguous prior to the MWL. The Definitions clarified that ambiguity for future court, PCHB and Ecology determinations. There was no expansion of water rights or reversal of previous determinations.

2. The Pumps and Pipes Provision Does Not Facially Violate Substantive Due Process (Issue #6).

WWUC incorporates section V(D)(3) of the State's Response to Burlingame Plaintiffs. The Court should reject Plaintiffs' claim that the pumps and pipes provision violates due process. As with the Definitions, Plaintiffs' claim is based on a mischaracterization of the state of the law prior to the adoption of the MWL and a mischaracterization of the manner in which the provision operates. Accordingly, the Pumps and Pipes provision did not change the law or contravene case law and there was no "expansion" of certificates issued under the pumps and pipes policy. Because the Pumps and Pipes provision does not reverse the law it therefore does not retroactively "enlarge" any rights and Plaintiffs' substantive due process challenge fails.

3. The Place of Use Provision Does Not Facially Violate Substantive Due Process (Issue #5).

WWUC incorporates section V(D)(2) of the State's Response to Burlingame Plaintiffs and section V(C)(3) of the State's Response to the Tribal Plaintiffs. In addition, WWUC offers the following arguments.

The Court should reject Plaintiffs' claims that the Place of Use Provision violates

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substantive due process. As a preliminary matter, Plaintiffs' claims are based on the alleged retroactive application of the provision. WWUC agrees with the State that the provision does not apply retroactively. Changes to the place of use under the provision occur only after holders of rights for municipal water supply purposes meet certain criteria in RCW 90.03.386(2). Several of these requirements, by their very terms, can only take place after adoption of the MWL, including the requirement that the water system plan comply with water conservation and efficiency standards. RCW 90.03.386(2). Therefore, because Plaintiffs' fundamental characterization of the retroactive operation of the provision is in error, Plaintiffs' substantive due process challenge also fails.

In addition, Plaintiffs cannot show any deprivation of rights. Plaintiffs assume that changes in place of use under Section 5(2) will "increase the amount of water used" and "change the pattern of return flows or aquifer recharge." *See* Burlingame Plaintiffs' Motion at 27. Such effects, they argue, conflict with the substantive due process rights of other right holders. There are several problems with this argument.

First, every water right contains a quantity provision that limits both the maximum rate of diversion from the source and the total quantity that may be diverted in any calendar year. RCW 90.03.290(3).[17] The Place of Use Provision in the MWL does not change the quantity limitation in any water right. Thus, Plaintiffs' assumption that water use will increase is unfounded. Rather, it is based on speculation that the full quantity of a

[17] Ecology's examination process and findings required by RCW 90.03.290(3) determine the quantity of water rights that an applicant can put to beneficial use. That quantity has two components – an annual quantity expressed in acre-feet per year (afy) and an instantaneous quantity expressed gallons per minute (gpm) or cubic feet per second (cfs).

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municipal water right would not be used in a less flexible area of usage.

Similarly, Plaintiffs wrongly assume that return flow patterns will be changed by changes in place of use. Plaintiff Tribes rely on the Massmann Declaration as an "illustrative example" of return flow patterns in Kitsap County. Assuming *arguendo* that the Massmann Declaration is proper evidence, it fails to demonstrate the alleged impairment. Dr. Massmann makes incorrect assumptions about the place of use of KPUD's water rights, which undermines his conclusions. *See* Hunter Declaration, at ¶¶ 5-12. More generally, Dr. Massmann wrongly assumes that changes in the service area or place of use of municipal water rights will always adversely affect recharge or discharge patterns. Groundwater recharge and wastewater discharge are highly fact-specific; the circumstances to which Dr. Massmann points for Kitsap do not obtain elsewhere. *See* Declaration of James W. Miller in Support of WWUC's Response at ¶¶ 6-7.

Furthermore, Plaintiffs overstate the relevance of cases from the irrigation context. When a farmer diverts water from a stream to water crops in a field, some excess water will run off to an irrigation ditch that returns to the stream. Downstream diverters may rely on that "return flow" to contribute to stream levels necessary to take water. If the farmer changes the place of use to a different field with a different point of return, then downstream water uses may be adversely affected. Plaintiffs posit a neat, but incongruous correlation between irrigation water use and municipal water use, which may explain why they avoid discussion of the factual context of any of the cases they cite in support of their place of use argument.

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Return flow in the municipal water rights context occurs in ways that do not correlate to the simple example of the farmer's field. After use, most municipal water is directed to wastewater treatment plants or to septic treatment systems. Wastewater is treated and discharged to either fresh or marine water environments consistent with the terms of State-issued discharge permits, or to groundwater in the case of septic systems. Further, the site of such discharges are generally fixed and unaffected by where a water system may make beneficial use of its rights. As a result, place of use and the point of return flow are typically de-linked in the municipal context, and downstream or junior water rights holders do not necessarily have either physical access to or a right to rely on return flow.

In support of their argument, Plaintiff's cite to *Big Creek Water Users Ass'n v. Dept. of Ecology,* PCHB No.02-113, the Colorado Supreme Court's decision in *Farmers Highline Canal & R. Co. v. City of Golden,* 129 Colo. 575, 272 P.2d 629 (1954), and the Washington State Supreme Court's decision in *Haberman v. Sander,* 166 Wash. 453, 7 P.2d 563 (1932). All of these cases involve disputes over the effects of proposed changes to move higher in a creek system the point of diversion of crop irrigation rights that were associated with fixed parcels of land subject to specific water duties, and prior decrees regarding their scope of use. None speak to the issues or effects of the flexible place of use of municipal water rights.

For example, the *Haberman* case involved a dispute over whether the point of diversion of a pre-1917 water code, riparian irrigation water right held under lease and

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previously adjudicated with other water rights, could be changed to an upstream ditch that would channel water to new farm land. *Haberman,* 166 Wash. at 460. The court rejected the proposed change, noting that it would adversely affect the flow of a creek important to the plaintiff and other downstream water right holders. *Id.* at 463. In this regard, the court expressed a principle of law that exists under the existing water code and applies equally to municipal water systems as well as irrigators -- namely, that both categories of water users must secure approval from the state to change the point of surface water diversions to avoid impacts to downstream users. RCW 90.03.380. The Place of Use Provision does not in any way change the requirements of that law or the related notice and comment procedures currently in effect.

Big Creek and *Farmers Highline Canal Co.* are similarly distinguishable. In *Big Creek* the PCHB examined a proposed change to move points of diversion. PSCHB No. 02-113, 2002 WL 31847634. Similarly, *In Farmers Highline Canal,* the Colorado Supreme Court was faced with a situation where the City of Golden sought to change both the manner of use and to move upstream the point of diversion of a previously adjudicated crop irrigation right involving a fixed parcel of land. *Farmers Highline Canal,* 129 Colo. at 577.

The plaintiffs in *Farmers Highline Canal* opposed the change as affecting water rights downstream of the new point of diversion, as well as return flows to the system. *Id.* at 577-78. The court agreed that the proposed water right changes could not occur absent analysis of these issues. *Id.* at 579. However, and as noted earlier, neither the Place of

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Use Provision nor any other provisions of the MWL changed the obligation of municipal water systems to file applications to change the point of diversion of surface water rights to examine impacts on upstream and downstream users. Consequently, the cases Plaintiffs cite do not support the Plaintiffs' argument.

Finally, the Burlingame Plaintiffs cite without any analysis *Okanogan Wilderness League, Inc. v. Town of Twisp,* 133 Wn.2d 769, 947 P.2d 732 (1997). While *Twisp* involved a municipal water right, the case addressed a contested change in point diversion from a river to groundwater wells. Contrary to Burlingame Plaintiffs' citation, Burlingame Plaintiffs' Motion at 9, *Twisp* did not involve issues concerning "places of use coextensive with service area boundaries." *Twisp* held that the town's water right had been abandoned (under the common law doctrine, not the relinquishment statute) and thus could not be changed from river diversion to wells. 133 Wn.2d at 786. Therefore, *Twisp* does not provide any support for Plaintiffs' claim regarding the Place of Use Provision.

Thus, the Court should reject Plaintiffs' assertion that an expansion in the place of use of municipal water rights under the Place of Use Provision would require municipal water systems to change their points of diversion, or the manner in which consumed water and/or effluent is collected, treated, and discharged.

4. The Connection and Population Provisions Do Not Facially Violate Substantive Due Process (Issue #4).

WWUC incorporates section V(C)(2) of the State's Response to Plaintiff Tribes and offers the following additional arguments.

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Plaintiffs' argument that the Connection and Population Provisions of the MWL (RCW 90.03.260(3) and (4)) violate substantive due process is based on a false premise – that the Water Code in effect prior to the MWL treated estimates of future population or number of connections in a permit or certificate as limitations on the development and use of a water right for municipal purposes. Instead, as noted by the State, the law prior to the MWL did not treat connection numbers or population figures as limiting factors.

RCW 90.03.260 sets out the requirements for a complete water right application, including specific information required for certain specified types of water uses, such as irrigation, mining and municipal. The purpose of this section is not to define the limits of any particular water right, which is addressed elsewhere in the Water Code at RCW 90.03.290, but to describe the information needed in an application for water rights so that Ecology can make an appropriate examination and decision. Prior to the MWL, 90.03.260 made no specifications whatever for the number of connections that a public water system wanted to serve, only a requirement to give the present population and "as near as may be estimated, the future requirement of the municipality." [18] Without a statutory requirement to specify the number of homes that could be connected to a water system, it is a considerable stretch to conclude, as Plaintiffs contend, that the Legislature intended water rights for public water systems to be limited to a certain number of connections. Similarly, when the statute uses the language "as near as may be estimated" when

[18] While there was no statutory definition of what constituted a "municipal" water use or a "municipality" prior to the MWL, Ecology often used the terms "municipal" and "community domestic" in describing the purpose of use in permits and certificates for public water suppliers. Ecology sometimes used these terms interchangeably, for instance, issuing a "municipal purpose" water right to a water system that was not owned by a municipality, such as Spanaway Water Company. Declaration of Jeff Johnson, ¶7, Exhibit A.

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referring to population, it is a considerable stretch to conclude, as Plaintiffs have, that the Legislature intended water rights for municipal systems to be limited to serving only a specific population. Quite simply, Plaintiffs are reading language into the statute as it existed prior to the MWL that was not there. They are attempting to divine an "intention" of each water right application as a limit on that right, when there is no statutory basis for such an exercise.

Ecology's practice over many decades was to limit the *quantity* of water authorized in permits and certificates for community domestic and municipal water systems, but not to limit the number of connections or the population served by such water systems. This is consistent with RCW 90.03.290, which provides:

> (3) The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit *stating the amount of water to which the applicant shall be entitled* and the beneficial use or uses to which it may be applied. (Emphasis added.)

There is no instruction to Ecology in this section, and none existed prior to the MWL, to limit the number of connections or the population that could be served by the applicant. If the Legislature intended that Ecology limit the number of connections or the population that could be served, rather than the *quantity* of water rights that a water supplier could put to beneficial use, it would have referred to the "number of connections" or "population" rather than the "amount of water" in RCW 90.03.290. This section must be read together with RCW 90.03 260 to determine the Legislature's intention.

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As noted by the State there was, at worst, an ambiguity or inconsistent practice by Ecology staff relating to whether connection numbers in a permit or certificate were to be construed as limitations. There was no statutory basis for staff to conclude in their letters, cited in the Plaintiff Tribes' Motion, that the number connections listed in a certificate could not be exceeded without a new water right application. Plaintiff Tribes' Motion at 13 n.17. The Department of Health also disagreed with those interpretations or those like it. *See* State's Motion at 35-36. This internal agency discrepancy was not resolved through policy or through litigation. *Id.* The Legislature appropriately used its police powers to resolve the ambiguity and confusion, and the effect of the Population and Connection Provisions can be retroactive as a result without violating substantive or procedural due process.

To make their point that a water right is limited to the applicant's intent at time of application, plaintiffs inappropriately cite to *In re Water Rights of Alpowa Creek*, 129 Wash. 9, 224 P.29 (1924), a case that did not involve municipal water rights or even water rights created under Washington's water code. Instead, the case was an adjudication of water rights for irrigation of agricultural land, created under the common law prior appropriation and riparian doctrines that existed prior to the Water Code of 1917. *Alpowa,* 129 Wash. at 12. Thus, the *Alpowa* case is completely irrelevant to RCW 90.03.260, to municipal purpose water rights, and to the effect of population numbers or connections in application forms, forms that did not even exist under the common law prior appropriation and riparian doctrines.

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Plaintiff's citation to *Dep't of Ecology v. Schuh*, 100 Wn.2d 180, 185, 667 P.2d 64 (1983), for this point is also mistaken and inappropriate. Like *Alpowa*, *Schuh* did not involve a new water right application or a municipal purpose water right. It involved an applicant's request to transfer the place of use and point of withdrawal of a ground water right for irrigation to a place outside the boundaries of a federal irrigation project. 100 Wn.2d at 181-182. The result of the change would have been to eliminate a quantity limitation on the existing water right -- that it was "supplemental" (non-additive) to the availability of water from the federal project. The water right sought to be transferred in *Schuh* was originally conditioned by Ecology's predecessor, the State Department of Conservation and Development, Division of Hydraulics, with the following limitation in the permit:

> Quantity of water appropriated shall be limited to the amount which can be beneficially applied less amount of water available from rights of Columbia Basin Project and not to exceed 1600 gallons per minute; 640 acre-feet per year, to be used for [irrigation].

100 Wn.2d at 182. This limitation meant that the ground water could only be used when the federal irrigation project water (Columbia Basin Project) was not available. Thus the water right at issue in *Schuh* was a back-up right to be used only when federal project water was unavailable. In affirming Ecology's rejection of the change application, the Supreme Court found that the net effect of moving the water right to property outside of that Project would be an expansion of the right to eliminate the significant limitation quoted above. 100 Wn.2d at 184-85.

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Contrary to the Tribes' Motion for Summary Judgment at p. 12, lines 17-19, the Supreme Court did not hold that a water right certificate is limited to its "original intent." The *Schuh* case involved a very specific quantity limitation in the permit, and is not applicable to the question whether population numbers or connection numbers in a permit or certificate, as distinguished from acre-feet or gpm, are limitations on the future use of a municipal or community domestic water right.

Finally, even if the Court determines that the population figures and number of connections are a limitation on municipal or community domestic water rights, the Plaintiffs have not demonstrated that they are deprived of their water rights by the Population and Connection Provisions. Due to the efficiency requirements adopted as part of the MWL, Plaintiffs cannot assume that the exercise of a right in excess of the population figure or number of connections in a water right will increase the overall quantity of water used.

5. The Case Law Upon Which Plaintiffs Rely in Support of Their Substantive Due Process Claims is Inapposite.

Plaintiffs rely heavily on case law from other jurisdictions, including *San Carlos Apache Tribe v. Arizona*, 193 Ariz. 195, 972 P.2d 179 (1999) in support of their argument that the MWL violates substantive due process. *See* Burlingame Plaintiffs' Motion at 22-23, 25; Plaintiff Tribes' Motion at 16-17, 19-20, 23, 25. However, *San Carlos* and the Idaho cases cited by Plaintiffs provide no such support and should be limited to their own unique set of facts.

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San Carlos involved two consolidated water rights adjudications, the Gila River and Little Colorado River adjudications, first initiated in 1974. *San Carlos,* 972 P.2d at 202. In 1995, in the midst of these adjudications, the Arizona state legislature passed legislation substantially revising key provisions of Arizona's surface water laws and the water law adjudication process. *Id.* at 203.[19]

Unlike the MWL, the statutes declared unconstitutional by the court in *San Carlos* substantively changed Arizona water law regarding forfeiture and abandonment in a pending adjudication, thereby altering the priority of thousands of water right claims. The Arizona statutes did not merely add definitions to the state's water code or clarify ambiguities in the law pertaining to water right certificates. To the contrary, the statutory amendments included blanket prohibitions on (1) the forfeiture or abandonment or a water right when water was used on less than all of an appropriator's land, and (2) the forfeiture of *any* water rights initiated prior to 1919. *Id.* at 206. The statute also added five entirely new exceptions to the forfeiture of a post-1919 water right for nonuse. *Id.* at 207.

Moreover, the *San Carlos* court found that the language of the statute, which stated that it was to apply to all water rights initiated or perfected on or before the effective date of the statute and to all general stream adjudications pending on the effective date of the act, "clearly and unequivocally demonstrated the Legislature's intention to apply [the law] retroactively." *Id.* at 204.[20]

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[19] At the time the legislation was enacted, more than 27,000 parties had been served in the adjudications and over 77,000 claims remained to be adjudicated. *Id.* at 202.

[20] The court accordingly rejected the defendants' argument that the statute could and was intended to apply purely prospectively. *Id.*

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In stark contrast to the MWL, the Arizona statute (1) involved a wholesale and fundamental change in the state's surface water law, creating new blanket prohibitions on forfeiture and abandonment and several new exceptions to statutory forfeiture, (2) was specifically aimed at changing the applicable law mid-stream in an adjudication proceeding that had been ongoing for over twenty years, and (3) by its own terms, was intended to retroactively apply to all water rights initiated or perfected prior to the effective date of the statute.

The *San Carlos* court also based its analysis in large part on the assumption that the junior appropriators in the pending adjudication held vested rights to water that might have been forfeited by senior appropriators under the law in effect prior to the 1995 statute. *Id.* at 205. The court did not analyze the nature of the junior appropriators' rights, nor discuss in detail why the rights were considered to be vested. *Id.* Instead, the key to the court's assumption that the water rights of the parties to the adjudications are vested rights was the timing of the statutory amendment in relation to the pending adjudication.[21] *Id.* In other words, in *San Carlos* an adjudication had been initiated and – unlike the case

[21] Indeed, the case law to which the *San Carlos* court cites in support of its conclusion that plaintiffs in that case had vested rights focuses on the timing by which a right becomes vested in the context of a legal proceeding. *San Carlos,* 972 P.2d at 205-208 (citing *Hall v. A.N.R. Freight System, Inc.,* 149 Ariz. 130, 717 P.2d 434 (1986)). The court in *Hall* held that, under Arizona law, the right to assert a defense vested upon the initiation of a legal proceeding in which the defense could be raised. 717 P.2d at 444. Until that time, the plaintiff held only an inchoate or prospective – not a vested – right. *Id.* Under Washington law, the analysis of whether a statute that impacts pending litigation is constitutional may yield a different result, since, under Washington law, the inquiry is not whether litigation is pending, but, instead, whether adjudicative body has issued any determinations construing the statute prior to the amendment. *See, e.g., Washington Farm Bureau*, 162 Wn.2d at 303-06 (where Legislature adopted an amendment to a statute while a legal challenge to the original statute was pending but before the lower court had announced its construction of the original statute, court holds that amendment does not violate separation of powers or due process).

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at bar – the water rights statute in *San Carlos* was specifically designed to change the rules in just such a pending legal proceeding.[22]

The case before this court does not involve similar facts. Contrary to Plaintiffs' assertions, this case does not involve "rights that had been statutorily relinquished" prior to the effective date of the MWL. *See* Burlingame Plaintiffs' Motion for Summary Judgment at 22. As explained in WWUC's motion for summary judgment, statutory relinquishment in the state of Washington does not occur until *after* a final order of relinquishment is issued by the PCHB or by a superior court. *See* WWUC Motion at 23. Unless and until such an order is entered, statutory relinquishment and/or extinguishment of a water right has not take place and Plaintiffs have no vested right to use that water. Moreover, as noted above, the MWL does not go back and "undo" a relinquishment order entered prior to the date of the MWL or interfere with an Ecology, PCHB or court consideration of a particular water right. Therefore the MWL does not suffer from the constitutional defect identified in *San Carlos*.

Plaintiffs also rely heavily on two Idaho cases: *Fremont-Madison Irrigation District and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996) and *A & B Irrigation Dist. v. Aberdeen-American Falls Ground*

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[22] The focus in both *San Carlos* and *Hall* on the existence of pending legal proceedings – or lack thereof – in determining whether rights are vested is entirely consistent with the "precipitating event" line of cases cited in WWUC's motion. *See* WWUC's Motion at 25-28. These cases hold that a statute is not retroactive merely because it draws upon antecedent facts for its operation. *Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guaranty Assoc.*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974). Instead, a statutory provision operates prospectively when the precipitating event for the application of the statute occurs after the effective date of the statute. *Id.* In this case, the precipitating event would be the evaluation of the potential non-use of water by Ecology, the PCHB or a superior court.

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Water Dist., 141 Idaho 746, 118 P.3d 78 (2005). *See* Burlingame Plaintiffs' Motion for Summary Judgment at 21-23, 25; Tribe Plaintiffs' Motion for Summary Judgment at 16, 19, 21, 23. Plaintiffs use these cases to support their conclusory argument that the alleged retroactive "expansion" of certain water rights under the MWL constitutes an injury to vested rights held by the plaintiffs and thus a violation of substantive due process.

Plaintiffs' reliance on these cases is misplaced. Neither case involves constitutional due process claims. Neither case involves an injury to vested rights. And, just like *San Carlos*, both Idaho cases involve a specific water right adjudication and statutes enacted to change the law applicable to that adjudication. Finally, neither case involves a statute that could operate prospectively.

Fremont-Madison involved two Idaho statutes specifically related to the ongoing Snake River basin adjudication. *Fremont-Madison,* 926 P.2d at 1302. Each statute granted certain water rights holders who were parties to the adjudication "amnesty" with regard to water rights which had not complied with required statutory permitting formalities. *Id.* at 1304.

The first statute, regarding accomplished transfers, provided that changes or transfers of water rights could still be claimed in the adjudication even if the water right holder had failed to comply with statutory permit requirements, so long as no other water rights existing on the date of the change were injured, and the change did not result in an enlargement of the original right.[23] *Id.* at 1305.

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[23] The accomplished transfer statute is consistent with the protection of junior water right holders built into the Washington statutes regarding applications for changes or transfer to water rights. *See* RCW 90.03.380;

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The second statute waived the mandatory permit requirements for enlarged water rights, and provided that an entirely new water right could be decreed for an enlarged use. *Id.* at 1306. That new water right would then be assigned a priority date tied to the date of completion of the enlargement, provided that the new water right for the enlarged use did not result in (1) an increase in the rate of diversion authorized for the original water right, or (2) an injury to existing junior water rights holders. *Id.* If the enlargement caused an injury to water rights existing at the time of the enlargement and that injury could not be mitigated, then the new right for the enlarged use would be subordinated in priority to any injured junior water rights. *Id.* The court held both statutes constitutional, noting that each statute contained provisions insuring that there would be no injury to junior appropriators. *Id.* at 1307.

Unlike plaintiffs' claims regarding the MWL, *Fremont-Madison* did not involve any constitutional due process claims. The *Fremont-Madison* plaintiffs asserted that the Idaho statutes violated an Idaho constitutional provision stating that the "right to divert and appropriate unappropriated waters to beneficial uses shall never be denied." *Id.* at 1303. Because the cases did not involve substantive due process claims, the opinion does not include any discussion of vested water rights, and there is no suggestion that the Idaho statutes caused injury to vested rights.

The Idaho enlargement statute essentially allowed for the decree in an adjudication of new water rights in enlarged amounts above and beyond the amounts contained in the

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RCW 90.44.100. In Washington, Ecology may not grant such an application if the change or transfer would impair existing water rights. *Id.*

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original water right, and assigned the new rights a priority date prior to that of junior appropriators. The Idaho supreme court held that the enlargement statute would violate the Idaho constitution if it allowed a party in an adjudication with a claim for enlargement to unconditionally receive a priority date as of the date of enlargement regardless of the injury to existing water rights held by junior appropriators.

In that context, it is unsurprising that the court noted that in most situations an "enlargement" of a senior right in an adjudication will cause some injury to existing junior rights. This holding does not, however, support plaintiffs' assertions that the MWL's alleged "expansion" of water rights constitutes a deprivation of vested property rights held by plaintiffs and thus a violation of due process.[24] In order to sustain their substantive due process claims, plaintiffs must show an injury to *vested property rights.* As explained above, no such injury exists, as plaintiffs cannot have a vested right in a mere expectation in the continued existence of their subjective interpretation of the law. The Plaintiffs here

[24] Plaintiffs use the terms "enlargement" and "expansion" interchangeably. It should be noted that the term "enlargement" used in the Idaho statutes has a specific statutory meaning and is not synonymous with the term "expansion." *Id.* at 1305. The "enlargement" discussed in *Fremont-Madison* as potentially causing injury to junior appropriators refers to the use of *additional* water over and above the amount of water contained in an original water right. *Id.* Such an enlargement could occur through "an increase in the number of acres irrigated, an increase in the rate of diversion or duration of diversion." *Id. Fremont-Madison* thus involves potential injury to junior appropriators' existing water rights, caused by a quantifiable increase in the senior appropriator's water right. The case at hand, however, involves allegations of injury to junior appropriators based on the theory that under plaintiffs' interpretation of pre-MWL law, such junior appropriators might have been entitled to water that was not fully used by senior appropriators, might have been relinquished and then reverted to the state, and might have eventually been allocated to the junior water right holders. Unlike the junior appropriators in *Fremont-Madison*, plaintiffs here seek not to prevent injury to their existing water rights, but rather to augment their existing rights by obtaining water currently allocated to senior appropriators.

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confuse the loss of a potential opportunity to attack the validity of another's water right with a deprivation of their own vested rights to use water.[25]

In addition, the potential injury to junior water rights holders discussed in *Fremont-Madison* arose solely in the adjudication context. The Idaho statutes directed the court in a pending adjudication to effectively change the priority of certain water rights. Since the very nature of an adjudication is to prioritize claims among competing junior and senior appropriators, it is only logical that in that context, in finding the statutes constitutional the Idaho supreme court emphasized the fact that the statute protected existing rights held by junior appropriators, and ensured that senior rights would not be "enlarged" at the expense of the priorities held by junior appropriators.

Finally, *Fremont-Madison* contains no discussion of whether the statutes at issue could operate prospectively. Unlike the MWL, the Idaho statutes were passed during a pending adjudication and were specifically designed to change the law applicable to that adjudication.

The *A & B Irrigation District* case is similarly inapplicable. This Idaho Supreme Court case involved the same enlargement statute held constitutional in *Fremont-Madison*. *A &B Irrigation District,* 118 P.3d at 84. The case arose on appeal from an adjudication court's ruling that an enlargement water right held by an irrigation district should be

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[25] The Tribes' citations to *Fremont-Madison* are particularly misleading. The Tribes cite to the case for the proposition that "retroactive expansion of some [water] rights, without statutory protections for the rights of other, facially violates the Constitution," and ". . . [the MWL] . . . violates due process because it enlarges one class of water rights to the detriment of other vested rights." *See* Plaintiff Tribes' Motion for Summary Judgment at 19-20. *Fremont-Madison* stands for neither proposition. The case does not involve claims of constitutional due process, and does not involve vested rights.

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subordinated under the statute to a junior water right, because injury to the junior appropriator could not be mitigated. *Id.* at 81. As with *Fremont-Madison*, the case did not involve claims of substantive due process, and the court did not hold that junior appropriators would suffer injury to vested rights. Instead, in the context of affirming the adjudication court's decision to subordinate the irrigation district's enlargement water right, the court stated that allowing a senior appropriator in an adjudication to receive an enlargement causes injury to a junior appropriator's right, and therefore under the terms of the statute it was appropriate to subordinate the enlarged water right to that of the junior water right holder. *Id.* at 84-85.[26] Just as with *Fremont-Madison*, the case should be limited to its facts: an analysis of a specific "enlargement" statute, in an adjudication context, involving no discussion of injury to junior appropriators' vested property rights.[27]

E. The Court Should Reject Plaintiffs' Claims that Provisions of the MWL On Their Face Violate Procedural Due Process (Issues 7 and 8).

In response to the Plaintiffs' arguments that sections of the MWL violate procedural due process, WWUC adopts and incorporates the State's responses in section V(D) of the State's Response to Tribal Plaintiffs and Section V(E) of the State's Response

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[26] Under the Idaho enlargement statute, the senior appropriator's original water right maintains its priority date, and only the enlargement water right, encompassing additional water above and beyond that delineated in the original water right, is subordinated to that of junior water right holders.

[27] *A&B Irrigation*'s only discussion of vested water rights actually supports Defendants – not Plaintiffs. The senior appropriator irrigation district had argued that it held a vested right in its enlarged water right by virtue of having filed a permit application. The court rejected this argument, stating that until a water right has actually been granted, "the applicant receives merely the 'hope' of a water right" and no vested right to water. *A &B Irrigation* at 85. Similarly, regarding Plaintiffs argument that they hold vested rights to water that might have been subject to relinquishment under their subjective interpretation of pre-MWL law, Plaintiffs hold nothing more than the "hope" of a water right – not a vested right protected by constitutional due process.

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to Burlingame Plaintiffs. Consistent with the Court's Order on WWUC's Motion to Strike Plaintiffs' New Claims, WWUC reserves the right to respond to Plaintiffs' arguments regarding the constitutionality of RCW 90.03.330(2) if Plaintiffs' file an amended complaint that is accepted by the Court.

VI. CONCLUSION.

For the foregoing reasons, WWUC requests that the Court deny the Plaintiffs' motions for summary judgment.

DATED this 24th day of March, 2008.

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